No. 155

GEORGE M. BOURQUIN,

Petitioner,

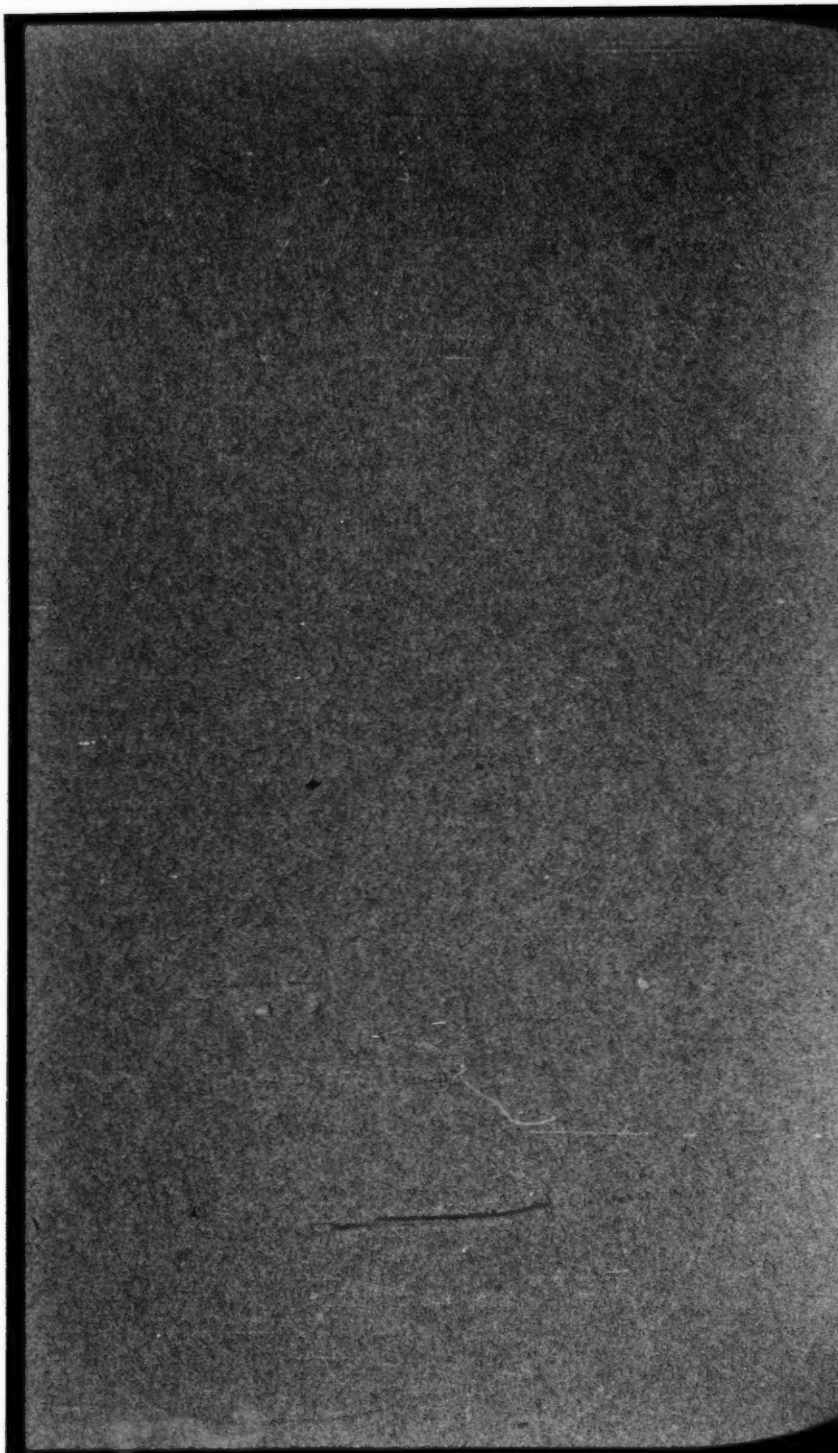
vs.

THE UNITED STATES.

IN PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITIONER'S REPLY BRIEF

GEORGE M. BOURQUIN,
In Pro Per.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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MAY IT PLEASE THE COURT:

Statement

By way of new matter, the solicitor General in his brief presents a Denison, Marhall correspondence (b. 23), and in it, the old salary law (44 Stats. 919), certain appropriation acts (b. 11), and his claim of "consistent administrative and legislative construction" of the old salary law (b. 10), he assumes to find warrant to resort to legislative history to impose upon the new salary law of July 31, 1946 (pub. Law 567), an implied exception of "retired" judges from the latter's express grant of increased salary "to each of the judges of the several district courts." The facts do not sustain his contention.

Argument

The old salary law and the new are like in language granting increased salary to each and all district judges *eo nominee*, without exception expressed. They are also like in that during consideration of the bills thereof (that of the old, very extensively debated), in neither house was there a single expression, oral or written, that "retired" judges were excluded from their all-inclusive grant. Now, contemporaneous therewith and at all times since the retirement law of 1919, Congress employed the words "judge", "district judge" and "district court" to import both "retired" and "active judges so-called" (this Court's characterization of the latter in Booth's Case, 291 U. S. 351, and mere labels), unless by express words it is manifest otherwise. Not an instance to the contrary exists, tho the Solicitor endeavors to find one. It is emphasized, not *one instance* of Congressional legislation to the contrary exists. Moreover, all prior legislation in relation to district judges and courts, at once applied to "retired" judges as they came into being. Proof of this appears in the Solicitor's reminder (b-9) that Act Feb. 11, 1938, 52 Stats. 28, was necessary to exclude retired district judges from the old law requiring district judges to reside in their districts.

And it is earnestly urged that this is a settled, long continued, invariable and *existing* Congressional practice and policy, controlling the construction of those words in the salary laws and disclosing their meaning and intent; and consistent with sound principle cannot be ignored and rejected for the first and only time, by implication to amend and change the clear and unambiguous new salary law, to exclude "retired" judges from its grant. In the face of it, the Solicitor's assumed "administrative and legislative construction" fades to insignificance.

That the old salary law included "retired" judges, finds further confirmation in that some few months subsequent, in order to supply monies for the increase, a deficiency act to that end, for the account of "salaries of circuit, district and retired judges", was duly enacted (45 Stats. 20).

Appropriation Bills

Adverting to the appropriation acts quoted by the Solicitor (b. 11), it would have been well to add the next paragraph, viz: "this appropriation shall be available for the salaries of all—district judges—whether active or retired."

And so far as he attaches significance and "practice" to the numbering of district judges and rate of salary in said acts, utter repudiation thereof by Congress appears in the later appropriation acts contemporaneous with the new salary law, by omission of numbering and rate, merely appropriating a lump sum for "district judges, whether retired or active." 58 Stats. 356 (1944), 59 Stats. 198 (1945).

However, appropriation acts are not permanent legislation, have no effect on existing rights, do not create policy or practice, but are mere temporary administrative authorization and direction for payment of monies owing and due. Generally, they are of data, schedules, computations, forms and language of the departments seeking appropriations.

Denison, Marshall Letters

The letters and actions of Assistant Attorney General Marshall disclose that from the beginning he was of opinion that "retired judge" and "resigned judge" are synonymous, equivalents, both ex-judges, private personages and pensioners. His letter of May 7th, 1926 (68 Cong. Rec. 169) to Representative Ramseyer, during pendency of the old salary law, is a list of "Federal judges resigned", in

which category he includes "retired" judges. Upon that theory to the then four retired judges he refused the increase of the old salary law, and upon that theory he and/or his associates in office strenuously contests Booth's Case, 291 U S.. 346,—a theory by this Court in said case rejected. Nonetheless, the shadow of that theory appears to some becloud the Solicitor's thought and brief.

Marshall's "practice" endured only to the death of the four retired judges, Judge Hale, the last, in 1934. (Fed. Rep. list of judges). With his death also died Marshall's and the Solicitor's "consistent administrative practise", of limited operation upon only four judges for different periods over a brief stretch of 7½ years.

Twelve years later is the new salary law, and the courts' Administrative Officer announced that in view of Marshall's letter to Denison, he was reluctant and averse to paying the increae to "retired" judges, until warranted by the judgment of a competent court.

A subordinate official's erroneous construction of the old salary law and his brief action upon it, do not establish a "consistent administrative and legislative construction and practice", open continuous and notorious. The plain and clear law, consistent with long settled legislative construction and public policy in regard to the meaning of words, can not thus be changed or annulled.

The plain and clear new salary law is immune to it.

Number of Judges

In the judicial Code is, of course, temporary. The number varies from time to time by appointments to new judgeships and successors to "retired" judges. It is evident the Solicitor is of opinion the "retired" judge is no longer to be enumerated, is an ex-judge (b. 7, 8).

This enumeration accurate today, inaccurate tomorrow, does not sustain the point the Solicitor would make (b. 7-9), and is immaterial.

Cases Cited by the Solicitor

Are not in point. The facts in the case at bar do not subject it to their rules. Typical of all is *U. S.* vs. *Am. Truck. Assoc.*, 310 U .S. 534. In that case resort is had to legislative history (1) to preserve congressional consistency in usage of words, and (2) to uphold settled public policy. In this case the Solicitor would employ it (1) to destroy the first, and (2) to overturn the last. There, the word "employees" had been of restricted construction; here, the words "district judge" had been always of general construction save when expressly restricted.

The cases as far apart as the poles.

Constitutionality of Retirement Law

The construction of the Court below impeaches it; that of Petitioner would uphold it in some part. See original brief, pages 12, 18, 19. Seemingly unable to sustain the former or to refute the latter, the Solicitor assumes the stance of an ostrich.

Conclusion

By reference, the paragraph concluding the original brief, is adopted here.

Respectfully submitted,

GEORGE M. BOURQUIN,
In Pro Per.